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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANDREW LINCOLN, Defendant and Appellant.	B159414 (Los Angeles County Super. Ct. No. BA206968)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anita H. Dymant, Judge. Affirmed in part, reversed in part and remanded with directions.

Robert Valencia, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Andrew Lincoln was convicted of three counts of attempted voluntary manslaughter and three counts of assault with a firearm, with personal use and great bodily injury allegations found true. He was sentenced to a state prison term of 23 years, 2 months. He appeals, claiming instructional, sentencing and constitutional error. We reject his claim of instructional error with respect to the assault with a firearm counts and affirm these convictions. However, we find the trial court improperly instructed the jury that intent to kill was not a required element of the crime of attempted voluntary manslaughter and remand for further proceedings as to those convictions.

FACTUAL AND PROCEDURAL SYNOPSIS

One summer evening, Lincoln went to the drive-thru window at Tam's Burgers on Central Avenue while his friend Patterson went to the walk-up window. Each ordered food, but Lincoln wanted to set his own price instead of paying the posted price. He argued with two employees (Victor Rangel and Julio Delgado) and then stuck his head through the window to spit in the face of a third employee (Juan Calderon) who had not been involved in the argument.

The Tam's employees went outside and got into a fistfight with Lincoln and Patterson. Patterson knocked Rangel to the ground. Calderon said, "Okay, that's the end of it," and the three went back inside and started working again. Lincoln and Patterson drove away.

About fifteen minutes later, Lincoln and Patterson returned. Lincoln walked up to the drive-thru window again, called out "motherfucker," stuck a gun through the window and shot five to seven times. One of the bullets hit Rangel in the side. Lincoln drove off again.

Lincoln was arrested and charged with three counts of attempted murder and three counts of assault with a firearm, along with special allegations that he had personally used a firearm and had personally inflicted great bodily injury.

In his first trial, Lincoln was convicted of one count of assault with a firearm involving Rangel, with the related special allegations of personal use and great bodily injury found true.[1]

At a second trial, the People presented evidence (including videotape from the restaurant's security camera) of the facts summarized above. In Lincoln's defense, his grandmother testified that she had happened to be riding in a friend's car when she saw the fight at Tam's. She said she saw one of the employees using a belt in the fight and saw Lincoln trying to stop Patterson from fighting. After the fight, she testified, she followed Lincoln and Patterson to Lincoln's house and spoke to her grandson for about 25 minutes until he went inside his house. Later, she passed Tam's and saw yellow crime scene tape around the restaurant.

The jury convicted Lincoln of three counts of attempted voluntary manslaughter as lesser included offenses of the three attempted murder charges as well as the remaining two counts of assault with a firearm. As to all of these charges, the jury also found that Lincoln had personally used a firearm and, as to the attempted voluntary manslaughter count involving Rangel, found that Lincoln had inflicted great bodily injury.

The trial court sentenced Lincoln to 23 years, 2 months in state prison. Lincoln appeals.

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[1] Lincoln initially appealed from this first conviction in case No. B159414 but requested a stay of briefing pending the filing of a new appeal from his subsequent convictions after his second trial (No. B164957). We then consolidated both appeals and Lincoln raises no issue with respect to the first trial.

DISCUSSION

I. The Trial Court Properly Refused to Instruct the Jury on Assault as a Lesser Included Offense of Assault with a Firearm.

Referring to the "initial confrontation" in which Lincoln spat in Calderon's face and the three restaurant employees then fought in the parking lot with Lincoln and his friend Patterson, Lincoln says the jury could have convicted him of simple assault as a lesser included offense to each of the assault with a firearm charges involving Calderon and Delgado (counts 5 and 6, respectively). We disagree.

As Lincoln acknowledges, the "trial court must instruct on a lesser offense necessarily included in the *charged* offense if there is substantial evidence the defendant is guilty *only of the lesser*." (*People v. Birks* (1998) 19 Cal.4th 108, 118, italics added.) Because the offense charged in counts 5 and 6—assault *with a firearm*—necessarily related to the shooting into the drive-thru window and not the "initial [parking lot] confrontation" described by Lincoln, the trial court's refusal to instruct the jury that simple assault was a lesser included offense for their consideration was proper.

The People's evidence was that Lincoln *shot* into the hamburger stand. Lincoln's defense (rejected by the jury) was that he was not on the scene at the time of the shooting, not that no gun was used (and the jury unanimously determined as to each count that Lincoln had used a gun). As the trial court explained: "[I]f the jury believes that [Lincoln] is the person who put his hand through the window with the gun[, then] it's an assault with a firearm. There is really not an issue that the person who put [his] hand through the window had a gun because there were shots fired." Accordingly, there was no substantial evidence that Lincoln was guilty only of simple assault but not assault with a firearm in connection with the charged shooting at Tam's.

II. We Reverse Lincoln's Conviction as to the Three Attempted Voluntary Manslaughter Counts Because the Jury Was Erroneously Instructed Regarding the Requisite Intent and We Cannot Conclude That the Error Was Harmless.

The trial court's instruction on attempted voluntary manslaughter at trial in 2002 told the jury that an element of the crime was "[t]he perpetrator of the attempted killing *either* intended to kill the alleged victim, *or acted in conscious disregard for life*." (Italics added.) In 2003, the court in *People v. Montes* (2003) 112 Cal.App.4th 1543, 1546-1547, held that such an instruction was erroneous because the crime of attempted voluntary manslaughter requires that the perpetrator act with an intent to kill; the crime cannot be committed when the perpetrator acts only "in conscious disregard for life." Lincoln did not object to the instruction at trial or on appeal.

Pursuant to Government Code section 68081, we requested supplemental briefing to address the following issues: (1) Did the trial court err in its instruction to the jury as to attempted voluntary manslaughter? (See *People v. Montes, supra,* 112 Cal.App.4th at pp. 1551-1552.) (2) If so, was the issue waived or forfeited by the failure to raise it in the trial court or on appeal? (3) If the issue was not waived or forfeited, what is the standard of review? (4) If there was error and it was not waived or forfeited, was it prejudicial on the facts of this case?

The Attempted Voluntary Manslaughter Instruction.

The trial court informed counsel of its intention to instruct the jury sua sponte on attempted voluntary manslaughter as a lesser included offense to the charged offenses of attempted murder. The prosecutor objected that, as a matter of law, the circumstances in evidence were "not such as would have aroused the passion of an ordinarily reasonable person faced with the same situation" and there was "sufficient time to cool off."

Defense counsel responded that, given the facts of the case, both questions were for the jury and "ask[ed] the court to give that instruction."

The court explained that it had endeavored to modify the voluntary manslaughter instruction to insert the word "attempt" throughout and recognized that it had missed some places. "[W]hat I can do is, without us going through it line by line right now, I can tell counsel that if the court gives the instruction, I would be modifying it . . . so there's no confusion. So every place it says 'killing' or anything like that, the word 'attempt to' or 'attempted' is going to be added to make it clear."

The court then ruled that the instruction on attempted voluntary manslaughter would be given as a lesser included offense warranted by the evidence. "I understand what the People are saying, [but] that is certainly an issue for the jury to decide . . . given that there's a dispute at the restaurant and then a fist fight which, to use [one witness's] most colorful language, ['']fisticuffs['] outside in the parking lot and a lot of bad language thrown around, the spitting, all of those circumstances and given the relatively short time in which it occurs . . . . [¶] And I am, of course, concerned that there might be error in not giving that instruction [as a lesser-included offense so] I am going to give . . . those instructions . . . ."

The jury was instructed: "The crime of attempted voluntary manslaughter . . . is a lesser crime to that charged in Counts 1, 2, and 3. [¶] Every person who unlawfully attempts to kill another human being without malice aforethought but either with an intent to kill, *or in conscious disregard of human life*, is guilty of attempted voluntary manslaughter in violation of Penal Code section 664[/1]92, subdivision (a). [¶] There is no malice aforethought if the attempted killing occurred upon a sudden quarrel or heat of passion. '*Conscious disregard for life,' as used in this instruction, means that an attempted killing results from the doing of an intentional act, the natural consequences of which are dangerous to human life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life.*

"In order to prove this crime, each of the following elements must be proved:

"1. There was an attempt to kill a human being;

"2. The attempt to kill was unlawful; and

"3. The perpetrator of the attempted killing either intended to kill the alleged victim, *or acted in conscious disregard for life; and*

"4. The perpetrator's conduct resulted in the unlawful attempt to kill." (Italics added.)

The jury was also instructed that for attempted murder, the following elements must be proved: "1. A direct but ineffectual act was done by one person towards killing another human being; and [¶] 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

Closing Argument.

The prosecutor argued in closing that the evidence established the elements of attempted murder, a direct but ineffectual act toward killing and the intent to kill. Contrary to CALJIC No. 17.10 (conviction of lesser included offense—implied acquittal—first) with which the jury was instructed, she said, "Only if you cannot come to a specific decision, all 12 of you, that [Lincoln] is not guilty of the attempted murder, do you then discuss [attempted] voluntary manslaughter. . . . [¶] Since it's a lesser-included [offense] of the attempted murder, you don't get to [attempted] voluntary manslaughter until you have all reached a conclusion that he's not guilty of attempted murder." She argued that the jury could not find attempted voluntary manslaughter. "This is usually used when, for instance, a man comes home and finds his wife in bed with another man and kills either her or the other man. This is used to reduce that murder to voluntary manslaughter because it's reasonable that someone in that circumstance would become so angry and his passion so aroused he would kill someone." She told the jury to ignore the instruction in this case because in this case, by contrast, it was not

reasonable to "try to kill someone" under these circumstances. Similarly, she argued, the "attempt to kill" did not occur while Lincoln was still under the immediate influence of a sudden quarrel or heat of passion.

In addressing the assault counts, she emphasized that the evidence proved Lincoln "willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force, a bullet on another person."

Defense counsel argued: "If someone really wanted to kill, . . . really had the intent to kill, willfully and maliciously—you look at the instruction, and it will define that[--] walk up, and when the guy steps up to the window, shoot him, or would you just walk up and 'Boom, boom, boom, boom, boom' and let the thing go wherever it goes? [¶] Examine the exhibits . . . . Those exhibits clearly show that it was random. They are bouncing all over the place. It appears that no one was being shot at in particular. With that kind of knowledge, look at the instruction." He then referred jurors to the instructions as well as the prosecutor's outline of the instructions.

The Instruction Was Erroneous.

The People concede that the instruction was erroneous as explained in *People v. Montes, supra,* 112 Cal.App.4th 1543. "[N]otwithstanding the fact that murder may be committed without an intent to kill, it has long been held that the crime of attempted murder does require an intent to kill." (*Id*. at p. 1549.) In other words, "one who shoots and kills without an intent to kill, but with conscious disregard for life and not in the heat of passion, can be guilty of murder. [Citation.] But one who acts with this very same mental state, and shoots but does no kill, cannot be guilty of attempted murder. This is because attempted murder requires an intent to kill." (*Id.* at p. 1550.) As the *Montes* court reasoned, the same rule should apply to attempted voluntary manslaughter: "[I]f the crime of attempted murder requires a specific intent to bring about a desired result (the killing of a human being), then it appears to us that the crime of attempted voluntary

manslaughter must also require a specific intent to bring about that same desired result (the killing of a human being)." (*Id.* at pp. 1549-1550.) Accordingly, the same instruction given in this case was found to be erroneous as it permitted the jury to convict of attempted voluntary manslaughter if they believed the defendant acted with conscious disregard, but no specific intent to kill.

Waiver, Forfeiture and Invited Error.

Lincoln concedes that he waived or forfeited the error in approving of and requesting the instruction as proposed by the court. Citing *People v. Turner* (2004) 34 Cal.4th 406, 433, the People argue that Lincoln is barred from challenging the attempted voluntary manslaughter instruction because he invited the error under the facts of this case. However, "[t]he trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction. (*People v. Graham* (1969) 71 Cal.2d 303, 317-319[; see also *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5].) The existence of some conceivable tactical purpose will not support a finding that defense counsel 'invited' an error in instructions. The record must reflect that defense counsel had a deliberate tactical purpose. As this court recently explained, *'the issue centers on whether counsel deliberately caused the court to fail to fully instruct, not whether counsel subjectively desired a certain result.'* (*People v. Wickersham* (1982) 32 Cal.3d 307, 334-335[, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201].)" (*People v. Oden* (1987) 193 Cal.App.3d 1675, 1683, additional citations omitted; italics added; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1057 [for the doctrine of invited error to apply, it "must be clear that counsel acted for tactical

reasons and not out of ignorance or mistake"]; see e.g., *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.)

Although the record demonstrates that defense counsel argued that the evidence included facts establishing sudden quarrel or heat of passion sufficient to support the finding of the lesser included offense of attempted voluntary manslaughter, there is no indication whatsoever that he saw or obtained any tactical advantage in the trial court's erroneous statement of the intent required for conviction of such an offense and none is apparent. (See *People v. Bradford, supra*, 14 Cal.4th at p. 1057.) To the contrary, the trial court indicated that it would modify the instruction to clear up any confusion, and it appears that the prosecutor, defense counsel and trial court were proceeding unaware of the deficiency of the instruction with regard to the element of intent.

"As the court forcefully stated in *People v. Keelin* (1955) 136 Cal.App.2d 860, 874[; citations]: 'Nevertheless, error is nonetheless error and is no less operative on deliberations of the jury because the erroneous instruction may have been requested by counsel for the defense. After all, it is the life and liberty of the defendant in a case such as this that is at hazard in the trial and there is a continuing duty on the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause.' Accordingly, if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error'; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction do we deem it to nullify the trial court's obligation to instruct in the cause." (*People v. Graham, supra,* 71 Cal.2d at p. 319.)

In any event, leaving to one side issues of forfeiture and invited error, as Lincoln urges, "an appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has authority to do so. [Citation.] Whether or not it should do so is entrusted to its discretion. [Citation.]" (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649 [exercising general discretion to excuse waiver and to address

instructional issue under Penal Code section 1469 (no objection required if instruction involves substantial rights of the accused)]; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 [appellate court may determine whether substantial rights were affected and reverse even though defendant did not object]; Pen. Code, § 1259.) Moreover, he says, we may address the issue to forestall an ineffective assistance of counsel claim.

The People present no further argument (except to say the result of a third trial would be "especially harsh for the victims" because the jury hung on all counts in Lincoln's first of two trials thus far) or authority to the contrary, arguing instead that Lincoln was not prejudiced by the error. We disagree.

We Cannot Say That the Error Was Harmless on the Facts of This Case.

According to the People, the instructional error was harmless in light of other instructions, closing argument of both prosecution and defense, and the facts of this case. Because other instructions made reference to the "specific intent" required, the People say, the jury must have understood from the instructions as a whole that Lincoln could not be convicted of attempted voluntary manslaughter unless he acted with specific intent.[2] We disagree. The problem is that these other more general instructions told the jury that the specific intent requirement for attempted voluntary manslaughter "is included in the definitions of the crimes set forth elsewhere in the instructions," (CALJIC No. 3.31), specifically directing the jury to the deficient attempted voluntary manslaughter instruction which allowed for a guilty verdict on a finding of either intent to kill or conscious disregard for life.

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[2] For example, the jury was instructed that "an attempt to commit a crime consists of two elements." The first element is a "specific intent to commit the crime." (CALJIC No. 6.00; see also CALJIC Nos. 2.02 (sufficiency of circumstantial evidence to prove specific intent or mental state) and 3.31 (concurrence of act and specific intent).)

As to the arguments of counsel, neither the prosecution nor defense counsel informed the jury a conviction for attempted voluntary manslaughter requires proof the defendant acted with the specific intent to kill the victim. Defense counsel's argument emphasized the randomness of the shots fired as absence of specific intent and referred the jury to both the prosecutor's argument and the instructions (including the erroneous attempted voluntary manslaughter instruction). Finally, the evidence did not unequivocally establish an intent to kill. Firing from a close range, Lincoln struck only one of three victims in the side, inflicting a non-lethal wound. The jury could well have found that Lincoln shot with the intent to kill, but given the physical circumstances, the jury could also have found that Lincoln fired his gun in conscious disregard for life. It cannot be said that the instructional error did not contribute to the verdict or that a different verdict would not have resulted absent the error.[3] Accordingly, the judgment with respect to the attempted voluntary manslaughter convictions must be reversed.[4]

DISPOSITION

The convictions for assault with a firearm are affirmed. The convictions for attempted voluntary manslaughter are reversed and the case remanded for further proceedings. In the event the People elect not to retry the attempted voluntary manslaughter offense or, if Lincoln is retried and found not guilty of attempted voluntary

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[3] Lincoln and the People agree that the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 applies. (But see *People v. Lee* (1987) 43 Cal.3d 666, 668 [applying *Chapman v. California* (1967) 386 U.S. 18 standard where "the jury received contradictory, and partially inaccurate, instructions regarding the element of specific intent to kill required to sustain a verdict of attempted murder"].) We need not resolve the question here as we cannot find the error harmless under either standard.

[4] In light of our resolution of this issue, we need not address Lincoln's remaining arguments.

manslaughter, the trial court shall lift its stay of execution of the sentence previously imposed on the assault counts.

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WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.